FILED
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No. 02-1076

In the

Supreme Court of the United States

MICHIGAN,

Petitioner,

v.

CEDRIC JOHNSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE QUESTION 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

OBJECTIONS TO PETITIONER'S STATEMENT OF FACTS 1

REASONS FOR DENYING THE WRIT 2

CONCLUSION 8

APPENDIX

SEARCH WARRANT ISSUED NOVEMBER 14, 2001 ..... 1a

TABLE OF AUTHORITIES

CASES

KATZ v UNITED STATES, 389 U.S. 347, 351-352, 88 S.CT. 507, 511, 19 L.ED.2D 576 (1967) 3

PEOPLE v ARTEBERRY, 154 MICH APP 1, 4, 397 NW2D 198 (1986), LV GTD 428 MICH 857 (1987) 7

PEOPLE v ARTEBERRY, 154 MICH APP 1, 397 NW 2D 198 (1986), RVD OTHR GRDS, 431 MICH 381, 429 NW 2D 574 (1988) 6

PEOPLE v BURBANK, 137 MICH APP 266; 358 NW2D 348 (1984), LV DEN 419 MICH 917 (1984), CERT DEN 469 U.S. 1190, 105 S CT 962; 83 L.ED.2D 967 (1985) 7

PEOPLE v HAWKINS, 163 MICH APP 196, 413 NW 2D 704 (1987) 6

RAKAS v ILLINOIS, 439 U.S. 128, 138-143, 148-149, 99 S.CT. 421, 427-430, 433, 58 L.ED.2D 387 (1978) 3

SIBRON v NEW YORK, 392 U.S. 40, 62-63, 88 S.CT. 1889, 1902, 20 L.ED.2D 917 (1968) 3

TERRY v OHIO, 392 U.S. 1, 24-25, 88 S.CT. 1868, 20 L.ED.2D 889 (1968) 5

UNITED STATES v DI RE, 332 U.S. 581, 68 S.CT. 222, 92 L.ED. 210 (1948) 5

WYOMING v HOUGHTON, 526 US 295, 119 S CT 1297, 143 L ED 2D 408 (1999) 4, 5

YBARRA v ILLINOIS, 444 U.S. 85, 100 S.CT. 338, 62 L.ED.2D 238 (1979) 5, 7

STATEMENT OF THE QUESTION

Respondent accepts that the Petitioner fairly states the question involved.

OPINIONS BELOW

Respondent accepts Petitioner's statement concerning the opinions below.

STATEMENT OF JURSIDICTION

Respondent accepts Petitioner's statement concerning this Court's jurisdiction.

CONSTITUTIONAL PROVISIONS

Respondent accepts Petitioner's statement concerning the constitutional provisions involved.

OBJECTIONS TO PETITIONER'S STATEMENT OF FACTS

Respondent takes exception to Petitioner's representation that the search warrant for 885 Heyden, Detroit described a particular individual as a "place" to be searched. As the warrant itself demonstrates, it would be more accurate to characterize the "seller" as a "person," not a "place," to be searched.[1]

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[1] The search warrant appears herein as Appendix A

This is not a trivial matter of mere semantics. While the warrant authorizes the search of a particular place based upon probable cause to believe that illegal activity had occurred there and that illegal drugs were present, it further relies on a "particularized probable cause" to believe that a specific person would be in possession of contraband. The warrant does not authorize the search of the person simply because he would be located at the premises where the search was to occur. Rather, it relies on probable cause to believe that this particular person would be in possession of drugs.

Here the "seller" is not simply a "place" within the premises, but a "person" who was reasonably believed to be in possession of contraband. On its face, the search warrant recognizes the unique and heightened protection afforded to a "person."

In all other aspects, Respondent accepts Petitioner's statement of material facts and proceedings.

REASONS FOR DENYING THE WRIT

In *Ybarra v Illinois*,[2] this Honorable Court held that a warrant authorizing the search of a public tavern and its employee bartender did not provide a basis for the search of a patron who happened to be on the premises at the time the warrant was executed. In doing so, this Court recognized that the unique and significantly heightened protection afforded against searches of one's person prohibits the search of an individual without a "particularized probable cause" to believe that the

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[2] 444 US 85, 100 S Ct 338, 62 L Ed 2d 238 (1979)

individual is engaged in criminal activity or in possession of contraband. As stated therein:

> It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. But a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. *Sibron v New York*, 392 U.S. 40, 62-63, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places. See *Rakas v Illinois*, 439 U.S. 128, 138-143, 148-149, 99 S.Ct. 421, 427-430, 433, 58 L.Ed.2d 387; *Katz v United States*, 389 U.S. 347, 351-352, 88 S.Ct. 507, 511, 19 L.Ed.2d 576.
>
> Each patron who walked into the Aurora Tap Tavern on March 1, 1976, was clothed with constitutional protection against an unreasonable search or an unreasonable seizure. That individualized protection was separate and distinct from the Fourth and

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> Fourteenth Amendment protection possessed by the proprietor of the tavern or by "Greg." Although the search warrant, issued on probable cause, gave the officers authority to search the premises and to search "Greg," it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers.[3]

Even though it may legitimately be argued that changes in the "legal landscape" occurring since *Ybarra* have given the police greater powers to conduct searches, this Court has consistently recognized the importance of the constitutional right to personal privacy upon which that case was decided. In *Wyoming v Houghton*,[4] the requirement of a "particularized probable cause" to search a person was clearly and unequivocally reaffirmed.

There this Court held that when probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. This Court determined that this rule applies to all containers within a car, without qualification as to ownership and without a showing of individualized probable cause for each container.

However, this Court therein clearly recognized that this right to search "containers" capable of concealing the object of the search does not extend to a search of the

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[3] Ybarra, 444 US at 91-92

[4] 526 US 295, 119 S Ct 1297, 143 L Ed 2d 408 (1999)

persons who merely occupy the vehicle, without an individualized probable cause. This Court expressly stated:

> In this regard–the degree of intrusiveness upon personal privacy and indeed even personal dignity–the two cases the Wyoming Supreme Court found dispositive differ substantially from the package search at issue here. *United States v Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948), held that probable cause to search a car did not justify a body search of a passenger. And *Ybarra v Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), held that a search warrant for a tavern and its bartender did not permit body searches of all the bar's patrons. **These cases turned on the unique, significantly heightened protection afforded against searches of one's person.** "Even a limited search of the outer clothing ... constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Terry v Ohio*, 392 U.S. 1, 24-25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Such traumatic consequences are not to be expected when the police examine an item of personal property found in a car.[5]

Recognizing that Ybarra turned on the unique

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[5] Houghton, 526 US at 303 (Emphasis Added)

constitutional protection afforded to a "person," Michigan appellate courts have consistently held that its rationale is equally applicable whether the place to be searched under the warrant was a public accommodation or a private residence.[6] As noted by the Michigan Court of Appeals:

> The prosecutor further argues that *Ybarra* is distinguishable since in the instant case defendant was visiting a private residence, not a public place such as a tavern. We are unable to make such a distinction. Defendant could legitimately expect as much privacy, if not more, when visiting her friends than while being a patron in a public place.[7]

This view recognizes that a person who is merely a visitor at a particular premises has a different expectation of privacy than the owner or residents of that premises. This applies equally, whether the premises is a business open to the public or a private residence. It is a fundamental principle of constitutional law that the Fourth Amendment protects persons, not places. To treat a person who is on any premises at the time a search warrant is issued as simply a container where the contraband may be located is an infringement on the visitor's constitutional right to personal privacy, and goes beyond the justifiable intrusion on the privacy of the owner or resident which is authorized by the warrant. As

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[6] e.g., People v Burbank, 137 Mich App 266, 358 NW 2d 348 (1984); People v Arteberry, 154 Mich App 1, 397 NW 2d 198 (1986), rvd othr grds, 431 Mich 381, 429 NW 2d 574 (1988); People v Hawkins, 163 Mich App 196, 413 NW 2d 704 (1987).

[7] Burbank, 137 Mich App at 271

noted below:

> We disagree with the prosecutor's argument that the search of defendant's person was authorized by the search warrant. In *Ybarra v Illinois*, 444 U.S. 85, 91; 100 S Ct 338; 62 L.Ed.2d 238 (1979), the Supreme Court noted that persons have a constitutional right guaranteed by the Fourth and Fourteenth Amendments to the reasonable expectation of personal privacy. When a search warrant is executed and persons not named in the warrant are searched on the basis of their presence on the premises made them "containers of the evidence." that constitutional right is eroded. *Ybarra*, supra; *People v Arteberry*, 154 Mich App 1, 4; 397 NW2d 198 (1986), lv gtd 428 Mich 857 (1987); *People v Burbank*, 137 Mich App 266; 358 NW2d 348 (1984), lv den 419 Mich 917 (1984), cert den 469 U.S. 1190, 105 S Ct 962; 83 L.Ed.2d 967 (1985).[8]

Petitioner argues that this Court should grant the writ because Michigan and other jurisdictions have misapplied *Ybarra* as controlling when a search warrant is executed at a private residence. In support of his position, Petitioner points out that constitutional and statutory "no-knock" requirements applicable to private residences delay entry into the premises, and permit any person on the premises to frustrate the purpose of the search warrant by simply hiding contraband on his or her person.

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[8] Petition For Writ of Certiorari To The Michigan Court Of Appeals, p. 10A

He seeks a bright-line rule that a search warrant authorizing a search of a particular private residence in and of itself permits the search of every person located on the premises as simply a "container" where contraband might be found.

But this argument simply fails to recognize that *Ybarra* turned not on the nature of the location where the search occurred, but rather on the unique and heightened constitutional protection afforded each person under the Fourth Amendment. Whether at a tavern open to the public, or in a private residence, a "person" should be subject to search only when there is a "particularized probable cause" to believe that individual is engaging in criminal activity or is in possession of contraband. As Michigan courts clearly and appropriately recognize, to hold otherwise would result in an erosion of that individual's constitutional rights.

CONCLUSION

For the reasons herein stated and discussed, Respondent requests that certiorari be denied.

Respectfully Submitted

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STATE OF MICHIGAN SS SEARCH WARRANT
COUNTY OF WAYNE AND AFFIDAVIT

TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY: CEIERE CAMPBELL
Affiant having subscribed and sworn to an Affidavit for Search Warrant, and having under oath examined the affiant, am satisfied that probable cause exists:

THEREFORE IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, I COMMAND THAT YOU SEARCH THE FOLLOWING PLACE:
The entire premises and curtilage of 8855 Heyden, which is described as a 1 ½ story, single family, light colored sided dwelling, located on the west side of the street between Joy Rd. and Dover, referred to hereafter as the target location, located in the City of Detroit, County of Wayne and the State of Michigan. Also to be searched is the seller, described as a b/m/ approximately 40-45 years old, 6'0, 1 70lbs, medium build w/dark complexion and short black hair, referred to hereafter as the seller, and to seize, tabulate and make return according to the law the following property and things; all controlled substances, all moneys, books and records used in connection with illegal narcotic trafficking, all equipment and supplies used in the manufacture, delivery, use or sale of controlled substances, all firearms used in connection with the above described activities, all evidence of ownership, occupancy, possession or control of the premises.

THE FOLLOWING FACTS ARE SWORN TO BY THE AFFIANT IN SUPPORT OF THE ISSUANCE OF THIS WARRANT.
1). The affiant is a sworn member of the Detroit Police Department Narcotics Division and was assigned to investigate a complaint of narcotic activity at the

above location. On 11-12-01 affiant met with a credible and reliable SOI#20 12 regarding the sale of narcotics from the above described place. Information from this SOI has been used on over 10 occasions by the affiant and other members of the Narcotics Division resulting in over 8 arrests for VCSA and other offenses, with over 8 convictions in Recorders Court and 36th District Court.

2). On 11-12-01 affiant met with SOI#2012. The SOI was searched for drugs and money with negative results, was issued a sum of Secret Service Funds with which to make the purchase. The affiant observed the SOI go directly to the target locations front door, enter, stay briefly, then return directly to the affiant and turned over a quantity of suspected cocaine, and indicated that it was purchased from the above described seller at the above described place using the funds provided. The SOI was again searched for drugs and money with none found.

3). The affiant conveyed the suspected cocaine to the Narcotics Section where a preliminary analysis proved positive. The cocaine was then placed into LSF#497947.

4), On 11-13-01 affiant conducted surveillance of the target location. The affiant observed at least 5 unknown persons arrive both on foot and in vehicles within a 30 minute period The affiant would observe the individuals travel to the front porch, enter, stay briefly, then leave. The affiant believes this information coupled with the above facts is consistent with ongoing narcotic activity.

5). The affiant has participated in over 50 narcotic raids in the City of Detroit. In the overwhelming majority of these raids illegal firearms were found used to protect the illegal narcotic trade.

6). Wherefore the affiant has probable cause to believe that the above described seller and items will be found on the above described premises.

A SEARCH WARRANT RETURN MUST BE FILED WITH THE PROSECUTOR'S OFFICE FOR EVERY SEARCH WARRANT WHICH IS APPROVED.

SUBSCRIBED AND SWORN TO BEFORE ME AND ISSUED UNDER MY HAND THIS 14th DAY OF NOVEMBER 2001

/s/
AFFIANT

/s/
APPROVED
ASSISTANT PROSECUTING ATTORNEY

/s/
JUDGE/MAGISTRATE OF THE 36th
DISTRICT COURT WAYNE
COUNTY MICHIGAN